

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
10 EDC 8869

FINAL DECISION

APPEARANCES

For Respondent: James E Cross Jr
Royster Cross & Currin LLP
PO Drawer 1168
Oxford NC 27565

ISSUE

EXHIBITS ADMITTED INTO EVIDENCE

For Respondent: 1 - 12

PETITIONER'S PENDING MOTION TO DISCLOSE

1. On February 21, 2011, Petitioner filed a Request to Disclose Conversation with the Office of Administrative Hearings in this case. Petitioner requested the undersigned and Respondents "disclose and make known the reason and content of their conversations during prior to, and during and after the hearing." On February 22, 2011, Petitioner *Father* filed a letter with the Office of Administrative Hearings indicating that an eyewitness "observed the exchanges I complained of" and that Respondent's attorney, Respondent's EC Director A.M., and the undersigned engaged in inappropriate sidebars during the administrative hearing.

2. On February 21, 2001, Respondent's attorney, James E Cross, Jr filed a response to Petitioner's requests with the Office of Administrative Hearings. In that letter, Mr. Cross stated:

In my 37 years of practice, I have never seen such a blatant disregard of the truth and disrespect of the Court. Judge Lassiter conducted herself very professionally in presiding over the above hearing. She extended courtesies to everyone, including *Father*. Other than the usual Courtroom pleasantries, which occur between parties, there was absolutely no ex parte communication whatsoever. The case stayed within the hearing room at all times.

Petitioner Father continues to make improper, untrue, and insulting comments about the Granville County Schools personnel, this attorney, and Administrative Law Judges. I would request respectfully that sanctions be issued to prevent him from continuing his libelous statements.

3. Canon 1 of the Model Code Of Judicial Conduct For State Administrative Law Judges provides that "A State Administrative Law Judge shall uphold the integrity and independence of the Administrative Judiciary," while Canon 3 says "A State Administrative Law Judge shall perform the duties of the office impartially and diligently."

4. Before, during and after the February 17, 2011 hearing in this case, the undersigned acted with integrity and impartially in accordance with the above Canons. Before, during recesses, and after the contested case hearing, the undersigned exchanged pleasantries with Respondent and its counsel, Petitioner *Father*, and his witness J.S., and the attending court reporter, Kay McGovern. Such pleasantries are a normal part of every court hearing, and include discussions of the weather, the prevalence of flu, estimated length of the hearing, coordinating parties' exhibits, and Petitioner *Father's* Bluetooth phone. Before the hearing, Respondent provided the undersigned with a code to a copier, so the undersigned could make extra copies of Petitioner's exhibits, so Petitioner could comply with the OAH requirement of providing

an original and a copy to the Court. Before the hearing, Petitioner had provided only one copy of his exhibits to the Court.

5. A reading of the complete transcript and the pleadings filed by Petitioner with the Office of Administrative Hearings revealed that this Court went to great lengths from the outset to inform Petitioner *Father* of legal concepts and principles to make sure that Petitioner was given every opportunity to receive a fair and just hearing. This Court is very mindful of Petitioner *Father's* status as a *pro se* litigant, and took great pains throughout the course of this hearing to assist Petitioner in questioning witnesses, making copies of Petitioners' exhibits, and assist Petitioner in ensuring the record was clear about his positions and issues in the case. The Court took great pains on numerous occasions to ensure Petitioner *Father* was aware of exactly what was going on and why during the hearing, and after the hearing regarding issuance of the undersigned's proposed decision.

6. A review of the record in this case shows that on January 24, 2010, Petitioner *Father* wrote a letter to Chief Administrative Law Judge Julian Mann stating:

I am writing to complain about Judge A.B.E. II being biased concerning 10 EDC 8869 [this contested case]. . . . I have not received an order from the clerk explaining the court's movements. I have sent letters complaining of the time lines and either the matter was dismissed and stated the Office of Administrative Hearings had no jurisdiction or I receive no responses. . . . I feel that the Judge E. is favoring the attorney in addition to delaying the hearing thereby violating the rules for timelines. . . I do not believe I am treated fair and I want to bring this to your attention.

(January 24, 2010 letter to Julian Mann, filed January 25, 2011 with the Court)

7. No bias exists by this Court toward Petitioner *Father* as is demonstrated by the repeated efforts to help Petitioner *Father* throughout the course of this hearing. Petitioner's Motion to Disclose is hereby Denied.

FINDINGS OF FACT

I. Issues Alleged in Petition

1. On December 13, 2010, Petitioner *Father* filed a contested case petition with the Office of Administrative Hearings requesting a due process hearing, and alleging that Respondent denied Petitioner *Student* a free and appropriate public when it failed to follow Petitioner *Student's* Behavior Intervention Plan (BIP) in November and December 2010.

a. Petitioners' first allegation was that Respondent failed to follow Petitioner *Student's* ("*Student*") BIP by issuing a November 9, 2010 letter to Petitioner, prohibiting Petitioner *Father* from "entering the campus of SS," and from "contacting any school

staff.” Petitioner alleged that this prohibition prevented Petitioner *Father* from participating in *Student’s* education.

b. Petitioners’ second allegation was that Respondent failed to follow Section IV in the BIP, which required Respondent take certain steps before they suspended *Student* from school; namely, “**call parent, parent conference, out of school suspension 1 day per an incident.**” (Emphasis in original, Petition) Specifically, Petitioners contend that Respondent failed to notify Petitioner *Father* before it suspended *Student* from school.

c. Third, Petitioners alleged that Respondent failed to follow *Student’s* BIP by suspending *Student* from school for 3 days for one incident that occurred on December 9, 2010.

d. Petitioner requests the following relief in his petition:

1. Determine and declare the appropriate use of a student assistant.
2. Reinstate the student assistant (parent’s choice).
3. Expunge *Student’s* records and any references to the disciplinary reports filed by Mrs. H..
4. Respect and observe the IEP BIP regarding parent involvement. The BIP calls for notification and involvement.
5. Respondent invite J.S. Educational Specialist to any future meetings.
6. All meeting will be audio recorded and transcribed legibly.

II. Adjudicated Facts

2. Petitioner *Father* is a resident of Granville County, North Carolina, and is the father of Petitioner *Student*. Petitioner *Student* is nine years old, and attends the fourth grade at Respondent’s S.S. Elementary school.

3. There is no factual dispute that under applicable state and federal law, *Student* is a child with a disability, as he is specifically categorized as Attention Deficit Hyperactivity Disorder (“ADHD”) and Oppositional Defiant Disorder (ODD). As such, *Student* is eligible for, and requires, special education and related services, including have an Individualized Education Program (“IEP”) pursuant to state and federal law.

4. Respondent Granville County Board of Education (GBOE) is the Local Education Agency (LEA) responsible for *Student’s* education. S.S. Elementary School is a public school operated and maintained by Respondent.

5. On October 12, 2010, the IEP team, consisting of Respondent’s educators such as Exceptional Children’s Director A.M., and Principal K.T. , Petitioner *Father*, and Ms. J.S., an educational specialist, held an IEP meeting. The IEP team added several

teaching strategies or tools to the BIP, as suggested by J.S., including (1) using social stories with *Student*, and (2) a behavior rating scale with a behavior chart. *Student* and the teachers would use a rating scale from 1 to 5 to rate specific behaviors with 1 being low and 5 being *Student's* best behavior. (Resp Exh 5) Every teacher and Petitioner *Father* would receive copies of this information daily. Petitioner *Father* and Ms. S. initialed these revisions at the meeting. (Resp Exhs 1 & 2)

6. Petitioner *Student's* October 12, 2010 BIP focused on the primary areas of behavioral concern for *Student*:

- I. Behavior 1: [*Student*] has difficulty understanding appropriate practices of social interaction with students.
- II. Behavior 2: [*Student*] often has outbursts and can be verbally aggressive and argumentative.

7. During this meeting, the IEP team revised *Student's* BIP by combining consequences 4 and 5 under section IV of *Student's* BIP. Consequence 4 of section IV states that the parent [Petitioner *Father*] and the administrator would be called simultaneously after *Student* exhibits a behavior that is addressed in the BIP. The IEP meeting minutes note:

Last step [of these consequences] after the office/parent contact if needed, more severe options will be discussed. It is written in *Student's* IEP/BIP that there will be one day of suspension per incident. If behaviors go beyond what is written in *Student's* BIP, then administrators follow local and state guidelines.

(Pet Exh 1)

8. On November 22, 2010, the IEP team, consisting of Respondent's educators, Petitioner *Father*, and J.S. held another IEP meeting. The team conducted an annual review of the IEP and BIP, "tweaked," or refined the teaching tools the team had added to the BIP in October 2010, and agreed to re-evaluations of *Student* in the areas of speech/language, and assistive technology. The team discussed that Ms. R.W., *Student's* special education teacher, would explain the behavior rating scale and behavior chart to *Student* the next day. (Resp Exhs 4 & 6)

9. J.S. suggested Respondent purchase a computer program known as "Co: Writer" to help *Student* with his writing. "Co: Writer" is a computer program that assists kids who have difficulty in writing. That day, Ms. M. purchased "Co: Writer" for *Student*. The next day, Respondent's occupational therapist took the program to *Student* for his use. (T pp 98-99) Respondent agreed to proceed with an assistive technology evaluation to see if there were other devices that would be useful for *Student*. Respondent would buy them if there were a needed device. (T pp 100-101)

10. On November 23, 2010, R.W. discussed the behavior rating scale and behavior chart with *Student*. R.W., A.D., the Teacher Assistants, Principal K.T., and *Student* decided the five rules that would apply to the rating scale for *Student*'s behavior chart. *Student*'s homeroom teacher, Mrs. H., and *Student*'s "specials" teachers were advised of the modifications to *Student*'s charting system and change to the behavior chart. R.W. also made *Student* aware that his dad and J.S. requested the following additions be made to the chart: 1) keeping hands to self including not touching others or other people's things, 2) Respecting others means no more than one argument (with teacher or other students). R.W. documented this discussion with *Student* in Respondent's Exhibit 7. (See also Resp Exh 9 for completed daily behavioral checklist for *Student* from May 2010 through December 9, 2010.)

11. On December 9, 2010, a fourth grade teacher, Ms. M., advised Principal K.T. that three students wanted to talk with her about an incident that happened on the playground that day.

a. Before lunch, the three students advised Principal K.T., in her office, that a couple of days ago, *Student* had spit on the shoe of one of those 3 students. *Student* kept following them. The teacher intervened, and got *Student* to go away from them, but the student did not tell the teacher what *Student* had done.

b. The students explained that several students heard *Student* say, "I'm going to take care of business today," when *Student* was going on the playground that morning. The students told K.T. that *Student* spat on the same student's shoe again that morning while they played on the playground. That student was upset. Her cousins, also fourth graders on the playground, asked *Student* why he was messing with that student. The students explained to Ms. K.T. that *Student* was cussing, and *Student* and the cousins were kind of in a huddle. The students indicated that the incident happened while Ms. H.'s class and another 4th grade class were on the playground around 10:15 am that morning.

c. Ms. H. and Ms. M. approached the students in the huddle and told them to break this up. After a teacher told *Student* to get away from the students, *Student* disobeyed the teacher, and went right back to the playground set where those students were located. The students said they saw *Student* hit a student in that back as *Student* followed that the student who was climbing the ladder to the slide. The students claimed that *Student* said the "f" word, the "b" word, and the "a" word. Another student alleged that *Student* hit other children in the face, and in the shoulder. (Resp Exh 10; T pp 130-135) *Student* had some words with Ms. M., and said, "This is not over yet." Ms. H. told *Student*, "You need to come with me," but *Student* would not do it. *Student* threw up his arm at Ms. H., and she stepped back. The students were more upset about how *Student* talked to the teachers than they were about *Student* hitting them. (T p 135)

12. Before lunch, Principal K.T. also talked with Ms. H.. (T p 135) H. told K.T. that she put her arm up to block his arm, and that "He [*Student*] would have hit me, had

I not stepped back.” (T pp 135-37) H. and *Student’s* arm touched each other. (T p 137) Principal K.T. asked Ms. H. to complete a Student Discipline Referral.

13. At 11:15 am that same day, Ms. H. completed the Incident Description portion of the Student Discipline Referral. Ms. H. described the incident that precipitated a discipline referral was:

Today on the playground, I witnessed *Student* being aggressive with other students. When I intervened in an attempt to follow his plan, *Student* would not listen to me. He continued to scream at me as well as the students. *Student* was also being aggressive toward me as I continued to try to speak to him.

(Resp Exh 10)

14. Principal K.T. attended a student assembly until 2:30 that day. After assembly, she called *Student* to her office and talked with him. K.T. noted that *Student* “admitted right off the bat what he had done with the teacher and what he had said.” (T p 135) *Student* admitted to Ms. K.T. that he spat on a student’s shoe on that day, December 9, 2010, and a couple of days ago. *Student* denied hitting anybody or cursing. He said he was yelling and screaming at Ms. H., and indicated he raised his arm, because he did not want to go with Ms. H.. (Resp Exh 10 p 2; T pp 136-137) *Student* gave Ms. K.T. names of students who were possible eyewitnesses. She told *Student* she would question those students since *Student* did not admit to everything the students alleged.

15. Ms. K.T. completed that bottom section of the Student Discipline Referral by writing the students’ allegations against *Student*. She advised *Student* to give the form to his father. She commented that *Student* was suspended from school beginning Friday, December 10 through Tuesday, December 14th for aggressive behavior at a student on the playground. She wrote:

Student cursed, punched a student in the back, hit a student in the eye, hit another student in the shoulder, and hit another student in the face. Both jaws.

(Resp Exh 10)

16. Around 3:30 pm, Principal K.T. phoned Petitioner *Father* regarding the morning playground incident involving *Student*. She left a message on *Father’s* cell phone as *Father’s* home phone was not working, advising him of the referral from Ms. H., and of her investigation so far. She advised Petitioner *Father* that *Student* was suspended for Friday, December 10, 2010 for refusing time-out, and being disrespectful to staff members, H. and Ms. M. She indicated she would investigate further on Friday, December 10, 2010, and call and email her decision if Petitioner would receive the 2

other days of suspension she had recommended on the Student Discipline Referral. (Resp Exh 10, 2)

17. At 4:33 pm on December 9, 2010, Principal K.T. emailed Petitioner *Father*, advising him that she had left a message on his cell phone about the playground incident involving *Student*. She reiterated the same information she had left on Petitioner *Father's* cell phone message. (Resp Exh 10, p 2)

18. At 12:58 pm on December 10, 2010, Ms. K.T. sent an email to Petitioner *Father* about her investigation. She noted that she had interviewed 5 eyewitnesses, in addition to 3 students directly involved, about the playground incident. All of the students heard *Student's* cursing, and being disrespectful to the teachers. One additional student saw *Student* hit a boy in the back. No one saw *Student* hit a boy in the face or jaws. K.T. decided to suspend *Student* for two days. She suspended *Student* on Friday, December 10, 2010 for being disrespectful to teachers, and for not going to time out as Ms. H. instructed. She suspended *Student* on Monday, December 13, 2010 for hitting a student in the back and cursing. (Resp Exh 10, p 3; T pp 136-142)

19. On December 10, 2010, Petitioner *Father* called Ms. K.T.. She returned his phone call at 3:40 p.m. and discussed the matter for twenty minutes. Petitioner *Father* told Ms. K.T. he thought the BIP had not been followed. (T p 141). Ms. K.T. advised that she could have suspended *Student* for three days just for the action he took toward Ms. H. alone. (T p 138)

20. At hearing, Petitioner *Father* asserted the team did not define the phrase, "if behaviors go beyond what is written in *Student's* BIP, then administrators follow local and state guidelines." However, a preponderance of the evidence showed that the IEP team did discuss and define what these sentences meant at the October 12, 2010 IEP meeting.

a. First, Petitioner's specialist, J.S., acknowledged that the IEP team "did discuss that." (T p 44) She explained that:

And this has been discussed not just at this meeting, but it also was discussed again when we were together in November. . . .

I believe the discussion ---at the meeting was that school board policy would follow for anything that was not in the BIP.

(T pp 44-45) AM, who also attended the October and November IEP team meetings explained at hearing, that if *Student's* behavior goes beyond what is addressed in *Student's* BIP, then the principal determines the appropriate punishment for that behavior, on a case-by-case determination, based on federal law, and school policy. The principal is allowed to suspend a child, regardless of his/her label, if a child's behavior is deemed aggressive. (T p 97)

b. In furtherance of this issue, J.S. clarified that the BIP addressed two behaviors. The goal for Behavior 1 is that, that behavior, i.e., outbursts, would decrease as listed on the plan. The goal for behavior 2 was that *Student* “will improve his ability to interact appropriately with adults by decreasing the amount of [the time] he argues with adults. (T p 47) J.S. further noted, “aggressive behavior piece is not directly written on the BIP.” (T p 47) Although she points out that Petitioner *Father* has requested that it be on there. (T p 47)

c. Principal K.T. noted that in October of last year, she suspended *Student* from school for choking a student on the playground. At that point, she and Petitioner *Father* discussed that whenever a child’s behavior is aggression, and the behavior is not the regular behaviors we see on the BIP, then K.T. treats *Student* like any other student in disciplining *Student*. (T p 138)

21. At hearing, Principal K.T. explained why she suspended *Student* from school for two days for two separate incidents on December 9, 2010. She described *Student*’s first behavior incident was when *Student* was disrespectful to Ms. H. and Ms. M., and refusing to go to timeout with Ms. H. The second behavior incident was *Student*’s aggressive behavior of hitting the student in the back and cursing at students. (Resp Exh 10, p 3; T pp 139-41) She acknowledged that she was more lenient with *Student* than she probably would have been with a regular education student, because she would have given three days [to them] without thinking twice. (T p 140)

22. The undersigned notes that Ms. K.T.’s hearing testimony about what *Student* told her about the playground incident was partly inconsistent with K.T.’s account of *Student*’s statements in K.T.’s December 9, 2010 email to Petitioner *Father*. In her December 9, 2010 email, Ms. K.T. wrote “He [*Student*] said he did not curse or hit anyone.” (Resp Exh 10, p 2) Yet, at hearing, Ms. K.T. indicated that *Student* “admitted to hitting the student in the back. . . . he did admit to hitting someone in the shoulder. . . “ T p 136) Nonetheless, the preponderance of evidence in the case, from other witnesses and documentation, negates any error, if any, raised by K.T.’s inconsistencies.

23. A preponderance of the evidence established that *Student*’s physical aggression of hitting a student in the back, while the student climbed the ladder to the slide, was not a behavior that *Student*’s current BIP addressed, or provided resulting consequences for that behavior.

CONCLUSIONS OF LAW

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned concludes:

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to applicable State and Federal laws. All

parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter.

2. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

3. Petitioner has the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005). The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing."

4. Petitioner *Student* is a child with a disability pursuant to State and Federal laws. Respondent is the Local Educational Agency (LEA) responsible for providing *Student* a free and appropriate public education (FAPE) in the least restrictive environment (LRE).

5. The Individuals with Disabilities Education Act (IDEA) and corresponding federal regulations are the federal laws that apply to Petitioner's allegations that Respondent failed to provide *Student* with a free and appropriate public education. The controlling State law for students with disabilities is Section 115C, Article 9 of the North Carolina General Statutes and the corresponding State procedures.

6. The IDEA defines free appropriate public education as one that provides the child with the disability with personalized instruction and sufficient support services to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176 (1982); *In re Conklin*, 946 F.2d 306 (4th Cir. 1991); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 293 S.E.2d 687 (1982).

7. In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206 (1982) the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The Court provided:

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts' procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

8. A determination that the District has failed either test is sufficient to support a determination that it did not provide an appropriate program. *Hacienda La Puente Sch. Dist. Of L.A. v. Honig*, 976 F.2d 487 (9th Cir. 1992)

9. 34 CFR §300.530(a), known as the "unique circumstances" clause, provides:

[S]chool personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

10. 34 CFR § 300.530(b)(1) states that a school district may suspend a student with a disability who violates the district's code of conduct for up to ten school days in a school year to the same extent that a student without disabilities would be suspended.

11. The preponderance of the evidence showed that Respondent was authorized under 34 CFR § 300.530(b)(1) to discipline *Student* for violating Respondent's code of conduct by exhibiting the above-described behaviors and conduct on the playground on December 9, 2010. The evidence showed that *Student's* BIP provided consequences for *Student's* behaviors that were specifically addressed in the BIP, but that any behavior beyond that addressed in the BIP would be subject to Respondent's code of conduct disciplinary procedures. The preponderance of the evidence also showed that Respondent did not violate the "unique circumstances" clause, as Respondent suspended *Student* for two days, instead of the required 3 days, based on *Student's* aggressiveness towards a student, and being disrespectful of two teachers.

12. A preponderance of evidence proved that Petitioner *Father* had discussed Respondent's code of conduct, at prior IEP meetings, when Petitioner *Student's* BIP would apply and dictate *Student's* punishment, and when Respondent's code of conduct would apply in punishing *Student*. These discussions occurred on October of 2009, at the October 12, 2010 IEP meeting, and at the November 22, 2010 IEP meeting. Although Petitioner *Father* and Respondent had discussed addressing physical aggression in *Student's* BIP, any physical aggression had not been added to *Student's* current BIP, as a behavior that would be addressed in *Student's* BIP.

13. A preponderance of the evidence also showed that Respondent attempted to follow *Student's* BIP on December 9, 2010 during the playground incident, but *Student* refused to obey his teacher's instruction, reproached students *Student* had been instructed to get away from, hit one of those students on the back, and yelled at Ms. H. and Ms. M.. Assuming Respondent failed to follow *Student's* BIP on December 9, 2010 "to the letter," any failure by Respondent did not rise to the level to constitute a denial of special education services to *Student*, and did not substantially deprive *Student* of delivery of special education services.

14. The preponderance of the evidence established that Respondent did not violate Petitioner *Father's* parental rights by prohibiting Petitioner *Father* from "entering the campus of Stovall Shaw," without first making an appointment through the office of the Superintendent of Respondent.

15. Any other relief sought by Petitioner in his petition was not the subject of this contested case, and will not be addressed by the undersigned in this case.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned finds that Respondent did not fail to follow *Student's* BIP and did not deny *Student* a FAPE.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

Inquiries regarding further requirements of appeal rights, notices and time lines, should be directed to the Exceptional Children's Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

This the 31st day of March, 2011.

MELISSA OWENS LASSITER
ADMINISTRATIVE LAW JUDGE